No. 11035

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JIM JUNG and MARTY SHERMAN,

*Appellants,*

*vs.*

CHESTER BOWLES, *Administrator,* Office of Price Administration,

*Appellee.*

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## APPELLANTS' OPENING BRIEF.

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### Jurisdictional Statement.

On April 13, 1944, Chester Bowles, Administrator, Office of Price Administration, filed an action against defendants Jim Jung, Marty Sherman, and Marvin Berry, individually and doing business as Victory Produce Company, for treble damages pursuant to the provisions of Section 205e of the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong. Second Sess., 56 Stat. 23) enacted January 30, 1942, contending that said defendants had during the period from April 12, 1942 to and including May 27, 1943, as intermediate sellers, sold and delivered at Los Angeles, California, early white potatoes, 1943 crop, in one hundred pound sacks, to wholesalers and retailers at a price in excess of the maximum price estab-

lished under the provisions of Maximum Price Regulation 271, as amended (7 Fed. Reg. 9179).

Mr. Louis Lerner filed an answer to the Amended Complaint on behalf of the three individual defendants, but Mr. Lerner later withdrew his appearance on behalf of defendant Marvin Berry, because of lack of authority to represent him, and pursuant to agreement between counsel for plaintiff and Mr. Louis Lerner, it was stipulated that Mr. Lerner represented only defendants Jim Jung and Marty Sherman. [Rep. Tr. pp. 20 and 21.]

The amended complaint appears in the Reporter's Transcript at pages 2 to 4, and the answer to the amended complaint appears at page 5.

On December 14, 1944, findings of fact and conclusions of law were signed by the trial court, and on the same day judgment was entered in favor of plaintiff and against defendants Jim Jung and Marty Sherman jointly in the sum of five thousand nine hundred seventy-seven and 18/100 ($5,977.18) dollars.

On March 9, 1945, Notice of Appeal to the Circuit Court of Appeals was duly filed from said judgment by defendants Jim Jung and Marty Sherman.

The pertinent provisions of Maximum Price Regulation 271 involved in this appeal are as follows:

> 1. "Sec. 1351.1002. *How a country shipper establishes his maximum price for a perishable food commodity, as set forth in Appendix A.* (c) If a country shipper makes a sale of food commodities for delivery to a place other than his country shipping point, his maximum price shall be the price established by him under paragraphs (a) and (b) of this section and Appendix A, *plus the transportation charges he has actually paid,* at lowest available common carrier

rates, from his country shipping point to the place where the commodities are to be delivered. In no case shall the country shipper include transportation charges, whether paid by him or not, from the farm where the commodities were produced to his country shipping point."

2. "Sec. 1351.1003. *How an intermediate seller calculates his maximum prices for perishable food commodities listed in Appendix B*—(b-4) The intermediate seller shall then determine his 'net cost' of his 'largest single purchase' as defined above, of the food commodity being priced. *'Net cost' means the amount he paid for the food commodity delivered at his customary receiving point* less all discounts allowed him except the discount for prompt payment; however, no charge or cost for local unloading or local trucking shall be included."

3. "Sec. 1351.1004. *Information which each country shipper and intermediate seller must pass on to his purchaser.* Whenever a country shipper or an intermediate seller makes a sale and delivery after the effective date of this regulation, he shall supply in writing, to his purchaser on his invoice, sales ticket, cash receipt, or other written evidence of the sale, the following information:

(a) The variety of the food commodity being sold;

(b) The grade of the food commodity being sold; and

(c) The selling price, not exceeding the maximum price, which the country shipper or intermediate seller has determined for the variety and grade being sold. *The invoice, sales ticket, cash receipt of other written evidence of the sale, when containing the above required information shall be deemed to be proper notification to the purchaser.*"

## Statement of the Case.

The action herein was brought by the Administrator of the Office of Price Administration against defendants Jim Jung, Marty Sherman and Marvin Barry, individually and doing business as Victory Produce Company. The Court will note that the action was *not* brought against the Victory Produce Company, a partnership, consisting of Jim Jung, Marty Sherman and Marvin Berry.

Marvin Berry was never served with process in the above action, even though his whereabouts were at all times known to plaintiff, and the only defendants who appeared in the action were the individual defendants Jim Jung and Marty Sherman.

On April 5, 1943, Jim Jung, Marty Sherman and Marvin Berry entered into a partnership known as Victory Produce Company which was dissolved on September 30, 1943. During the period from April 12, 1943 to and including May 27, 1943, neither the defendant Sherman nor the defendant Jung personally made any sales of potatoes in the wholesale produce business. All sales of potatoes were made by employees of Victory Produce Company, a partnership, consisting of Jim Jung, Marty Sherman and Marvin Berry.

During the aforesaid period the Victory Produce Company purchased potatoes on a "delivered" basis in one hundred pound sacks from country shippers located in the Bakersfield area. These potatoes were transported by contract carrier from the country shipping point to the Los Angeles docks of the Victory Produce Company located in the Los Angeles City Produce Market. The freight rate charged by the contract carrier to the country shipper for the transportation of said potatoes and

paid for by the Victory Produce Company to the country shipper as part of its "net cost" was the sum of thirty cents per hundred pounds.

The Victory Produce Company computed its selling price by determining its "net cost", to wit, *the amount it paid for the potatoes delivered at its customary receiving point, less all discounts allowed,* and then by multiplying its "net cost" either by 21% or by 9½%, depending upon whether the company made a "delivered" sale or a "cash and carry" sale, as the case might be. The company thus used the appropriate mark-up on its "net cost", which included the transportation charges actually paid, to wit, the sum of thirty cents per hundred pounds.

It is Appellee's contention that the Victory Produce Company in determining its "net cost" should not have included the figure of thirty cents per hundred pounds which was actually paid for transportation of the potatoes, but that it should have included instead the figure of eighteen cents per hundred pounds, because it is Appellee's position that the ceiling price for said service as performed by said contract carriers in the Bakersfield area should have been the sum of eighteen cents per hundred pounds, and that the Victory Produce Company bore the responsibility for making inquiry to ascertain that fact.

It is the contention of Appellants that the company complied with Maximum Price Regulation 271, Sections 1351.1001 to 1351.1005, inclusive, and that it was proper for the company to include in its computation of its "net cost" the actual freight charge paid for the services of the contract carrier, to wit, thirty cents per hundred pounds, and that it did not have to go behind the invoice, sales ticket or other written evidence of the sale presented to it by the "country shipper".

## Specification of Errors.

Appellants specify that the following errors were committed by the trial court:

1. The trial court erred in awarding judgment against Appellants Jim Jung and Marty Sherman because the partnership known as Victory Produce Company, consisting of Jim Jung, Marty Sherman and Marvin Berry, which was the only entity against which judgment might have been awarded, was not a party to the action.

2. The trial court erred in determining that it was obligatory upon the "intermediate seller" to inquire into the propriety of the contract carrier freight rate included by the "country shipper" in the price of the potatoes purchased by the "intermediate seller" upon a "delivered" basis.

3. The evidence was insufficient to support the judgment against the Appellants in the following respects:

a. The evidence failed to show that the Victory Produce Company as the "intermediate seller" sold in excess of its ceiling price within the meaning of the provisions of Maximum Price Regulation 271, as amended.

b. Appellee failed to introduce any evidence to show what the country shipper's lowest available common carrier rate was with respect to the potatoes shipped by the country shipper to the customary receiving point of the Victory Produce Company during April and May of 1943.

c. The evidence failed to show that the Appellants Jim Jung or Marty Sherman made any sales of potatoes or

that they were personally liable for any violations of the provisions of the Maximum Price Regulation 271, as amended.

4. The Court erred in admitting and in refusing to strike out the following evidence:

a. The evidence of the common carrier freight rates in April and May, 1943, charged for the shipping of potatoes from the Bakersfield area to Los Angeles, California, should not have been admitted for the reason that it was completely immaterial to the issues of the case. [Rep. Tr. p. 14.]

b. Evidence of the price charged by Edison Trucking Company or any other contract carrier for the haul of potatoes from the Bakersfield area to Los Angeles in March, 1942, was inadmissible for the reason that it was immaterial, irrelevant and hearsay. [Rep. Tr. pp. 18, 19, 25 and 26.]

c. All the evidence introduced by plaintiff showing the methods by which the "country shipper" determines his maximum ceiling prices under the provisions of MPR 271, as amended, was inadmissible for the reason that it was immaterial, irrelevant, and no proper foundation was laid therefor. [Rep. Tr. p. 17.]

d. All evidence of sales of potatoes during April and May, 1943, made by Victory Produce Company, which was not a party to the action, was incompetent, irrelevant, and immaterial for the reason that the only parties before the Court were the individuals Jim Jung and Marty Sherman. [Rep. Tr. pp. 18, 19, 21, 52, 67, 75, 82-94.]

## ARGUMENT.

### I.

### The Trial Court Erred in Awarding Judgment Against Appellants Jim Jung and Marty Sherman Jointly, Because the Partnership Known as Victory Produce Company, Consisting of Jim Jung, Marty Sherman and Marvin Berry, Which Was the Only Entity Against Which Judgment Might Have Been Awarded, Was Not a Party to the Action.

From the outset appellants herein have consistently maintained, and do persist in their contention, that if any violation of Maximum Price Regulation 271 was committed, it was committed by the partnership known as Victory Produce Company and not by the individual defendants who were sued in this action. It will be noted that the defendants named in this suit are "Jim Jung, Marty Sherman, and Marvin Berry, individually and doing business as Victory Produce Company". Victory Produce Company, a copartnership, has at no time been made a party to this action, nor has it ever been served with summons.

Under the law of the State of California on this point, where defendants are sued in their individual names, but are characterized as copartners and doing business under a firm name, the action is against the persons or individuals named and not against the partnership, although such names are followed by the description "partners doing business under" a designated firm name, such additional averments being considered mere *descriptio personae*.

*Billings v. Finn*, 55 Cal. App. 134;

*Ferry v. Northern Pacific Stages*, 112 Cal. App. 348.

Likewise, a copartnership comprised of individuals, transacting business under a common name, is for the purposes of Section 388 of the California Code of Civil Procedure a legal entity distinct from its members.

*Craig v. San Fernando Furniture Company,* 89 Cal. App. 167;

*Ferry v. Northern Pacific Stages,* 112 Cal. App. 348;

*Potts v. Whitson,* 52 Cal. App. (2d) 199;

*Maclay Company v. Meads,* 14 Cal. App. 363;

*Bollman v. Bachman & Co.,* 16 Cal. App. 589;

*Minehan v. Silveria,* 131 Cal. App. 317.

The Court's attention is called particularly to the case of *Craig v. San Fernando Furniture Company,* 89 Cal. App. 167, wherein plaintiffs filed an action for personal injuries against San Fernando Furniture Company, a corporation, and Ira E. Stewart, who was alleged to be an employee of the company. More than one year after the accident, plaintiffs filed an amended complaint suing defendants "San Fernando Furniture Company, Alex Cohen, Louis Cohen and Morris Cohen, co-partners doing business under the firm name and style of San Fernando Furniture Company, and Ira E. Stewart, Defendants," and alleged that defendant Stewart was the employee of all the defendants named therein. The attorneys for defendants moved to dismiss and to strike said amended complaint upon the ground that plaintiff had brought in new legal entities therein. Said motions were granted by the trial court and plaintiff appealed. The California District Court of Appeals held, first, that in changing the designation of the San Fernando Furniture Company from that of a corporation to that of a copartnership, there was no

change in the defendant entity of San Fernando Furniture Company. In that connection the Court stated,

> "It clearly appears from a reading of the original and amended complaint that the plaintiff at all times was urging her claim of damages against a business concern operating under the name of the San Fernando Furniture Company and which had in its employ as a truck driver, one Ira E. Stewart."

The Court further held as follows:

> "There is considerable authority to support the proposition that where a firm is doing business under a common name, whether it be a partnership or other association of persons, the group relation as designated by the common name constitutes a separate legal entity from that of the individuals who form the group. . . . The trend of authority seems to support this view, although there are cases, particularly from other jurisdictions, that would justify a contrary line of reason."

Accordingly the judgment of dismissal as against the defendant San Fernando Furniture Company was reversed, but the judgment of dismissal as against Alex Cohen, Louis Cohen, and Morris Cohen was affirmed. It is therefore apparent that the defendant truck driver in the Craig v. San Fernando case was not the employee of the individual partners, but of the partnership known as San Fernando Furniture Company. Likewise, in the instant case, the salesmen who made sales of the potatoes were the employees of Victory Produce Company, the copartnership, and not the employees of the individuals Jim Jung, Marty Sherman and Marvin Berry. The entity responsible for the acts of the employees was their employer Victory Produce Company which, for some reason known

only to the plaintiff, was not made a party defendant to this action.

To the same effect was the statement of the California District Court of Appeal, in *Ferry v. North Pacific Stages*, 112 Cal. App. 348 at page 351, as follows:

> "The remaining question is, was the Seattle-Portland-San Francisco Auto Stage Company also made a party defendant, as an association or partnership? Did the court have jurisdiction of this company as an association? It is true paragraph III of the complaint further alleges, 'D. M. Shattuck, John Doe Christie . . . were at all times . . . and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co.' It is also true the title to the complaint includes these last-mentioned individuals as party defendants. The foregoing language clearly indicates it was the intention of the pleader to constitute these named individuals as party defendants. They are merely identified as doing business in the name of the Seattle-Portland-San Francisco Auto Stage Company. The company as a separate entity, is not made a party defendant. To have included this last-mentioned company as a party defendant independent of the individuals who are alleged to compose the organization, it should have been specifically named as a defendant. This was not done. Our courts have uniformly held, without exception, that similar descriptions of individuals as members of an association or partnership, does not constitute the organization itself a party to the action. This is not an action pursuant to the provisions of section 388 of the Code of Civil Procedure against the 'common name' under which individuals are associated and doing business."

In the case of *Maclay Company v. Meads,* 14 Cal. App. 363, where suit was filed in unlawful detainer against a series of defendants "acting and assuming to act under the name and style of Petaluma Transportation Company" by reason of a breach of a lease agreement entered into between plaintiff and the Petaluma Transportation Company, the Court, in holding that the partnership entity and the individuals were distinct and separate, used the following illuminating language in its decision, at page 372:

> "But where, as here, the action is against the members of the partnership in their individual character, and not against the partnership by its partnership name, the effect of service of process or summons on one member, or on all the members, is not to summon the partnership but only the member or members upon whom such service is had, *and, in such case, in order to bind all the members of the firm by any judgment which may be obtained in the action, service of summons must be made on all.* Of course, where the action is against the partnership, then, by the terms of section 388, *supra,* service of summons on one or more of the members of the partnership is sufficient, and thereby the judgment in the action is binding not only upon 'the joint property of all the associates,' but also upon 'the individual property of the party or parties served with process.' We entertain no doubt that, tested by the provisions of section 388 of the Code of Civil Procedure and the decisions to which we have directed attention, the complaint here falls far short of disclosing that plaintiff, however much it

may have intended to do so, proceeded against the Petaluma Transportation Company. As in *Davidson v. Knox,* 67 Cal. 143, (7 Pac. 413), and *Feder v. Epstein,* 69 Cal. 456, (10 Pac. 785), so it is true here, that the defendants, though constituting, according to the averments of the complaint, the partnership named the Petaluma Transportation Company, 'were not sued by their common name, but by their individual names,' and *the action was, therefore, against each member of said partnership, in his personal and not in his partnership character."*

Likewise, the Court in the case of *Potts v. Whitson,* 52 Cal. App. (2d) 199 at page 206, stated:

"Language almost identical in form, and entirely so in principles of expression, to that used in the body of the complaint in the case before us, 'That at all times herein mentioned, R. D. Whitson and Herman Lewis were and are co-partners doing business under the trade name and style of Whitson-Lewis Theatres,' has been consistently held to be *descriptio personae.* . . . In *John Bollman Co. v. S. Bachman & Co., supra,* (1911) 16 Cal. App. 589, 590 (117 Pac. 690, 122 Pac. 835), it appears that in a complaint against and a demurrer by 'Simon Bachman and Arthur Bachman, co-partners doing business under the firm name of S. Bachman & Company' the quoted language was held to designate the partners as individuals and not the firm as an entity. Thus we find that the partnership which plaintiff now claims filed the answer was not sued by its common name; that its name does not appear in the

> title of the complaint as a party; that the allegations in the body of the complaint serve only to identify and describe the individual defendants and that the cause of action is specifically stated against the individuals. . . . In the light of the foregoing discussion it is apparent that the entity Whitson-Lewis Theaters was not made a party to the action and that the answer filed by the defendants R. D. Whitson and Herman Lewis constitutes an answer on their behalf as individuals and not an answer on behalf of a stranger to the action which would have no standing therein (*Artana v. San Jose Scavenger Co.,* (1919) *supra,* 181 Cal. 627, 629)."

The evidence is uncontradicted that neither appellant Marty Sherman nor Jim Jung nor Marvin Berry ever personally made any sales of potatoes during April or May of 1943. [Rep. Tr. pp. 77, 78.]

Furthermore neither of appellants had anyone working for them as individuals to buy or sell any potatoes, but at all times it was the employees of the Victory Produce Company who sold potatoes in the course and scope of the partnership business. [Rep. Tr. pp. 77, 78 and 104.]

It is therefore evident that plaintiff failed to sue and to have before the Court the proper party defendant, against which alone plaintiff could have hoped to establish liability, to wit, Victory Produce Company, a copartnership. Consequently, the judgment entered against the individual Appellants was erroneous.

## II.

## The Trial Court Erred in Determining That It Was Obligatory Upon the "Intermediate Seller" to Inquire Into the Propriety of the Contract Carrier's Freight Rate Included by the "Country Shipper" in the Price of the Potatoes Purchased by the "Intermediate Seller" Upon a "Delivered" Basis.

### 1. The Country Shipper and Intermediate Seller Under MPR 271.

Maximum Price Regulation 271, as it existed during the period set forth in plaintiff's complaint, was specifically divided into certain sections which were appropriately and particularly headed:

> Sec. 1351.1002—How a *country shipper* establishes his maximum price . . .
>
> Sec. 1351.1003—How an *intermediate seller* calculates his maximum price . . .
>
> Sec. 1351.1004—Information which each country shipper and intermediate seller must pass on to his purchaser.

Accordingly, if a country shipper wishes to compute his maximum price, he looks to Section 1351.1002. If an intermediate seller wishes to compute his maximum price, he looks to Section 1351.1003. When the country shipper sells to the intermediate seller, he must "supply in writing to his purchaser on his invoice, sales ticket, cash receipt, or other written evidence of the sale," the information contained in Section 1351.1004. The intermediate seller must do the same when he sells to his purchaser.

Furthermore, Section 1351.1004 specifically provides that *"the invoice, sales ticket, cash receipt or other written evidence of the sale when containing the above required information shall be deemed to be proper notification to the purchaser."*

A reasonable construction of the aforesaid sections of Maximum Price Regulation 271 would seem to require that each seller in determining his maximum price is governed by a particular section relating to him, and that each purchaser is given the right to rely upon the correctness of the information supplied to him in writing by his seller. For it must be kept in mind at all times that the parties are dealing in perishable food commodities that must be marketed from farmers to consumers in order to prevent spoilage. Therefore, when the Victory Produce Company received delivery of the potatoes at its customary receiving point, to wit, its docks in Los Angeles, from the country shipper in the Bakersfield area, and was presented with the country shipper's price on a written invoice containing the information required by Section 1351.1004, which included a contract carrier's freight charge of thirty cents per hundred pounds, the Victory Produce Company was entitled to rely upon the correctness of the country shipper's computations and the validity of the freight charge made, without further inquiry on its part, because the "written evidence of the sale, when containing the above required information shall be deemed to be proper notification to the purchaser." In other words, the Victory Produce Company had the right to base the computation of its selling price upon the price which it paid to the country shipper as set forth in his invoice, without bearing the responsibility of determining whether the country shipper had correctly ascertained and included

the proper freight charge in the price at which he was selling.

Peculiarly enough, this very problem was presented in another case involving the Office of Price Administration against the Appellant Jim Jung in the District Court, Southern District, Central Division, No. 3475-Civil, before the Honorable Judge Leon Yankwich, wherein said Jung was charged with violating Maximum Price Regulation 292, as amended (8 Fed. Reg. 135), in connection with the purchase and sale of tangerines. Judge Yankwich's penetrating opinion was rendered on November 21, 1944, and appears in Volume 2, page 2232 of Pike and Fisher's Desk Book—Opinions and Decisions.

In the tangerine case, Sections 1351.1405 (c) and (d) were involved. In said sections as in the instant case, the "base price" of the intermediate seller was defined to be the base price *furnished* to him or *reported* to him by his supplier. In that case, as here, counsel for the Office of Price Administration contended that defendant Jim Jung, who had purchased tangerines from a commission merchant and from an intermediate seller could not take as his base price the price he had paid to the commission merchant and intermediate seller, unless the commission merchant or intermediate seller had correctly computed the price at which he was selling according to the regulation.

Of this contention, Judge Yankwich said,

> "Nor can I follow the Administrator in his contention that before the defendant could pay the price asked by Ko, it was imperative that Ko shall have computed correctly the base price at which he was selling. The regulation, and especially the clauses of the section referred to, (see (c) and (d)), do not

place such responsibility upon an intermediate seller. They permit him to ground his price upon the price *furnished* or *reported* to him by the seller. *They do not make it his duty to ascertain* whether the seller had computed the price correctly, under penalty of having his resale price challenged. It may well be, as counsel for the Administrator stated, that 'base price' in this regulation are words of art and must be interpreted in the light of the aim to be achieved by the regulation. But this does not require us to place a responsibility upon one vicariously where the regulation does not impose it.

It is also true that, in an action of this character, inquiry might be made to see if a purchase was a mere subterfuge to avoid the regulation. Here the evidence is uncontroverted that the purchase from Ko was made at the price shown on the face of the drafts."

Furthermore, a consignment of tangerines involved in the above case had been packed originally in Imperial Valley and had then been transported by their packer, first, to Los Angeles, and then to San Francisco. They were then shipped from San Francisco to Los Angeles. The Office of Price Administration contended that the only freight charge that could be properly added was the charge from Imperial Valley to Los Angeles. Judge Yankwich held otherwise and stated, "Under the circumstances, I think that the *actual freight paid* should be considered in making the computation in order to determine what the overcharges were on the sales from this consignment."

Appellants further submit that the Office of Price Administration itself is responsible for the aforesaid con-

struction of MPR 271. In that connection, Appellants refer the Court to Example (a) contained in the footnote to Section 1351.1018 of MPR 271, as issued November 7, 1942. In illustrating how a terminal market wholesaler (an intermediate seller) sets his maximum prices, the explanatory footnote states: "Looking at his cost *as set forth by the country shipper's invoice,* he finds the 'net cost' for these potatoes to be $1.90 per cwt. . . . To this 'net cost' . . . *he adds the actual freight of $179* . . . etc." Thus, the intermediate seller is led to believe that he may rely upon the country shipper's invoice, to which the actual freight paid may properly be added in computing his maximum price. In the instant case, Victory Produce Company purchased the potatoes from the country shipper on a "delivered" basis, that is, delivery was made by the country shipper to the intermediate seller's customary receiving point, to wit, its docks at the wholesale market in Los Angeles, California. The evidence is uncontroverted that the purchase by the Victory Produce Company from the country shipper was made at the price shown on the face of the invoices which included the freight charge actually paid by the country shipper.

A logical and reasonable construction therefore of the appropriate sections of Maximum Price Regulation 271 leads to the inevitable conclusion that the intermediate seller may rely upon the information contained in the written evidence of the sale supplied to him to the country shipper, and it is not the duty of the intermediate seller to investigate whether the country shipper correctly computed his price with respect to the transportation charges made and paid by the country shipper.

### 2. MPR 271 and GMPR.

It is the contention of Appellee that the Victory Produce Company was obligated to inquire into and to determine that the freight charge of the contract carrier paid by the country shipper actually complied with the General Maximum Price Regulation. With this contention Appellants take issue. Sections 1499.2 and 1499.3 of the General Maximum Price Regulation provided for freezing of prices of commodities and services generally as of March, 1942. However, Paragraph 1499.21 of the General Maximum Price Regulation provided as follows:

> "1499.21 *Effect of other price regulations.* 1499.13, 1499.14, 1499.15 and 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this General Maximum Price Regulation shall not apply to any sale or delivery for which a maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, by the Office of Price Administration, unless otherwise provided in any such price regulation. (Paragraph 1499.21 as amended by Am. 7, 7 F. R. 4659, effective 6-25-42.)"

The plain intent of the above language is to take out of the General Maximum Price Regulation any commodity for which prices are established in subsequent schedules of prices established by the Administrator of the Office of Price Administration. Early white potatoes are governed by MPR 271, first issued in November of 1942 and subsequently amended and revised on numerous occasions. Therefore, anything pertaining to the definition or ascertainment of ceiling price on early white potatoes must be sought in MPR 271 and not in the General Maximum Price Regulation.

The only exception would be in those instances in which Maximum Price Regulation 271 or Revised Maximum Price Regulation 271 specifically referred to the General Maximum Price Regulation as indicated by that part of the above quoted language of Section 1499.21 of GMPR, "unless otherwise provided in any such price regulation."

In none of the amendments to MPR 271 from November, 1942 to June 30, 1943, was anything said in the regulation as to the measure of transportation charges that the country shipper might pay to contract carriers. Finally, however, on June 30, 1943, Amendment 3 of the Revised Maximum Price Regulation 271 was issued, reading as follows:

> "4. Section 8 (a) (17) is amended to read as follows:
>
> (17) 'Cost of transportation' means: (i) If shipment is by a common carrier. . . .
>
> (ii) If shipment is by a carrier for hire other than a common carrier (such as a contract carrier) the amount actually paid to the carrier *but not in excess of the maximum charges as determined by the General Maximum Price Regulation, amendments, and supplementary regulations thereto,* or such other regulations of the Office of Price Administration as may be applicable to the services of such carrier at the time of movement. The amount of the transportation tax imposed by Section 620 of the Revenue Act of 1942 may be added."

Thus, not until June 30, 1943, at a period subsequent to the transactions alleged in plaintiff's complaint, did MPR 271 expressly state that the contract carrier's rates

paid by the country shipper or intermediate seller shall not exceed the maximum price as determined by General Maximum Price Regulation.

Appellee seeks to invoke the aforesaid rule retroactively by implication. Appellants submit that such an implication is barred by the language of GMPR 1499.21, which expressly stated that except for the paragraphs enumerated therein and which are not germane to the principal case, the GMPR should not be read in or become a part of subsequent regulations unless otherwise provided in any such subsequent price regulation. MPR 271, with its amendments and revisions, is such a subsequent regulation and any determination of price schedules of early white potatoes must be ascertained from the four corners of MPR 271. Thus, the stand taken by Appellee in its attempt to penalize Appellants for trucking charges actually paid by the country shipper to transport the potatoes to Victory Produce Company is insupportable under the price regulations pursuant to which the Office of Price Administration has instituted its action.

### 3. MPR 271 and Its Amendments.

The very history of MPR 271 from November 7, 1942 to June 30, 1943, supports Appellants' contentions that the Victory Produce Company properly calculated its maximum price in accordance with MPR 271.

The evidence is uncontroverted that the early white potatoes delivered by the country shipper to the Victory Produce Company were not shipped by common carrier from the Bakersfield railway station to the Los Angeles railway station, but were shipped by contract carrier, by truck, from the country shipper's source in the Bakersfield area to the docks of the Victory Produce Company in Los

Angeles, its customary receiving point. Almost all of the potato shipments had been received by Victory Produce Company in that manner.

MPR 271 did not forbid transportation by contract carrier, nor did it purport to regulate the price to be paid by the country shipper to the contract carrier for the transportation of said potatoes. The only regulations relating to transportation set forth in MPR 271 was one that related to "available common carrier." The Office of Price Administration finally began to realize that the regulation had failed to take into consideration the practical fact that country shippers might utilize contract carriers instead of common carriers. Therefore, it was not until March 18, 1943, in Amendment 5 to MPR 271 that the word "contract carriers" was even mentioned in Section 1351.1014 (a) (2). Thereafter on May 25, 1943, Revised Maximum Price Regulation 271 was issued, becoming effective as to all intermediate sellers on May 31, 1943. It is interesting to note that RMPR 271 made the following significant removals from the MPR 271 in force and effect during the period set forth in plaintiff's complaint. From MPR 271 effective during the period from April 1, 1943 to May 27, 1943, the following sections were removed: 1351.1002 (c), 1351.1003 (4) and 1351.1004. In place of the first two of the aforesaid sections which were removed, amendments were inserted so that when the sections spoke of "cost of transportation", there was added "(the lowest common or contract carrier rates for available transportation)." Thus, for the first time the Office of Price Administration recognized and attempted to secure some sort of control over the cost of transportation by contract carrier. Nevertheless, RMPR 271 remained silent as to the measure of transportation charges that the coun-

try shipper might pay to such contract carriers and it was not until June 30, 1943, in Amendment 3 to RMPR 271 hereinbefore set forth that a definite regulation was made that the "amount actually paid to the contract carrier" shall be "not in excess of the maximum charges as determined by the General Maximum Price Regulation, amendments and supplementary regulations thereto."

It is therefore apparent from a history of MPR 271, the amendments thereto and of the Revised Maximum Price Regulation 271 culminating in Amendment 3 thereof, that the measure of transportation charges which the country shipper might pay to the contract carrier was not made subject to control.

Appellants submit that they should not be penalized for acts committed by the Victory Produce Company in compliance with the regulation because of the failure and confusion on the part of the Office of Price Administration itself to enact the proper regulations to bring the subject matter of contract carrier rates paid for by the country shipper within the scope and control of MPR 271.

#### 4. The OPA and the Country Shipper.

Appellants had consistently maintained before and during the trial of the above action that the Office of Price Administration should proceed, if at all, against the country shipper who had included the contract carrier freight rate of thirty cents per hundred pounds in his invoice to the Victory Produce Company. After judgment had been obtained herein, the Office of Price Administration went

to trial on or about the 12th day of February, 1945, in the District Court, Southern District, Northern Division, in action No. 217, against the country shipper, Marvin Berry. In that case the Office of Price Administration claimed, as in the instant case, that Marvin Berry should have charged eighteen cents per hundred pounds of potatoes for the transportation charge by truck of the potatoes shipped by Marvin Berry to the Victory Produce Company, instead of the thirty cents per hundred pounds paid and charged by him. This Court may take judicial notice of the fact that on this aspect of the case, plaintiff was defeated in its claim and failed to recover a judgment against the defendant country shipper. Thus, we have an anomalous situation wherein the Victory Produce Company, the intermediate seller, having paid the thirty cents per hundred pounds transportation charge, included in the country shipper's price, was penalized for an act committed by the country shipper, which act of the country shipper was held not to be in violation of MPR 271 in the OPA's suit against the country shipper. Certainly, if the country shipper was found to have complied with MPR 271, the intermediate seller cannot be found to have violated MPR 271. It cannot be contended that what it was legal for the country shipper to charge, it was illegal for the intermediate seller to pay. Under the circumstances, therefore, a reversal of the judgment against the Appellants would seem imperative.

## III.

## The Evidence Was Insufficient to Support the Judgment Against Appellants Jim Jung and Marty Sherman.

### A. The Evidence Failed to Show That the Victory Produce Company as the "Intermediate Seller" Sold in Excess of Its Ceiling Price Within the Meaning of the Provisions of Maximum Price Regulation 271, as Amended.

The Office of Price Administration had the burden of proof to establish by clear and convincing evidence that Victory Produce Company sold early white potatoes in excess of its ceiling price within the meaning of the provisions of Maximum Price Regulation 271. Appellants submit that plaintiff failed to sustain this burden.

1. First, if we assume for the purpose of argument that the Victory Produce Company was obliged to inquire into the transportation charge paid for by the country shipper and included by it in its price charged to the Victory Produce Company, then appellants contend that there is no evidence in the record showing the "lowest available common carrier rate" existing at the time of the transactions here in question. Although the figure of twenty-two cents per hundred pounds is freely discussed by counsel for the respective parties as being the prevailing common carrier rate, nowhere is there any evidence introduced to establish that any common carriers were *available* to transport the potatoes at the time of the transaction in question. In fact, the only testimony on the part of plaintiff's witness, George M. Meyers, a freight clerk for the Southern Pacific in the freight office in Los Angeles, was to

the effect that he had no knowledge as to whether or not there were any freight cars available during the two months in question, to wit, during April and May, 1943. [Rep. Tr. p. 16.]

Since Section 1351.1002 provided that the country shipper, in establishing his maximum price, would add "the transportation charges he has actually paid, at lowest available common carrier rates from his country shipping point to the place where the commodities are to be delivered", it was incumbent upon plaintiff to prove that a common carrier, to make the common carrier rates applicable, was *available* for shipment of the potatoes in question. Unless and until plaintiff met that requirement by introducing evidence to that effect, it wholly and completely failed to establish that the price of the country shipper paid by Victory Produce Company, including the transportation charge, was in excess of its ceiling as provided.

2. Second, plaintiff failed to show that it was improper for Victory Produce Company to pay the transportation rate of thirty cents per hundred pounds charged by the contract carrier to the country shipper. Its introduction of evidence that truckers in the Bakersfield area in March, 1942, were charging eighteen cents per hundred pounds for similar transportation failed to sustain plaintiff's burden of proof because of the inapplicability of the General Maximum Price Regulation to this situation as hereinbefore set forth under Subdivisions 2 and 3 of Point II hereof.

**B. Plaintiff Failed to Introduce Any Evidence to Show What the Country Shipper's Lowest Available Common Carrier Rate Was With Respect to the Potatoes Shipped by the Country Shipper to the Customary Receiving Point of Victory Produce Company During April and May of 1943.**

The evidence is uncontradicted that shipment of the potatoes here in question was made by the country shipper from the Bakersfield area to the docks of the Victory Produce Company in Los Angeles, California. The evidence is further uncontradicted that the docks of the Victory Produce Company were its customary receiving point of the potatoes during April and May of 1943. This Court can take judicial notice of the fact that the Southern Pacific Company shipped from its terminal in the Bakersfield area to its terminal, the Union Station, in Los Angeles. Plaintiff must admit that the railroad terminal in Los Angeles of Southern Pacific Company was not the customary receiving point of the Victory Produce Company, and, consequently, any evidence introduced by it to show the lowest available common carrier rate was inapplicable and irrelevant to the situation and insufficient to support its contentions in this case.

It is a known fact that, because the common carrier does not make a habit of transporting food such as potatoes from the door of the country shipper to the door of the wholesale marketer, the contract carrier has become a vital and necessary means of transporting potatoes from the source of the country shipper to the place of business of the intermediate seller. This means of transportation

was not adopted by either the country shipper or the intermediate seller for the purpose of evading the OPA regulations, but because it is a faster, more efficient and, all in all, even a cheaper method of transportation of perishable food commodities. The Victory Produce Company, therefore, cannot be condemned for utilizing a means of transportation which is used by practically everyone in the same situation in the industry.

**C. The Evidence Failed to Show That the Appellants Jim Jung and Marty Sherman Made Any Sales of Potatoes or That They Were Personally Liable For Any Violations of the Provisions of the Maximum Price Regulation 271, as Amended.**

The argument in support of the above contention is fully set forth in Point I of this Argument, which is adopted as though incorporated herein at this point. The evidence is uncontradicted that neither of the Appellants Jim Jung or Marty Sherman, individually or personally sold or bought any potatoes nor had anyone working for them individually who sold any potatoes. [Rep. Tr. p. 104.]

## IV.

## The Court Committed Errors in the Admissions of and in the Refusal to Strike Out Certain Evidence.

### A. The Evidence of the Common Carrier Freight Rates in April and May, 1943, Charged for the Shipping of Potatoes From the Bakersfield Area to Los Angeles, California, Should Not Have Been Admitted for the Reason That It Was Completely Immaterial to the Issues of the Case. [Rep. Tr. p. 14.]

1. Appellants have previously pointed out that the intermediate seller under the terms of MPR 271 would be justified in paying to the country shipper the price shown upon the country shipper's invoice, and was under no obligation to inquire into the correctness of the computations of the country shipper's price, which included the transportation charge of the contract carrier.

2. Practically all of the potato shipments were made from the country shipper's source to the customary receiving point of the intermediate seller, to wit, the docks of Victory Produce Company, located at 1124 South San Julian Street, Los Angeles, California. Unless plaintiff could show that the common carrier charged for and performed the same service of transportation from the country shipper's source to the docks of Victory Produce Company, any evidence as to the common carrier rates for April and May, 1943, was absolutely immaterial.

3. Furthermore, said evidence did not directly relate to whether or not the freight rate was the "lowest available common carrier rate" for said period. For the foregoing reasons, appellants submit that the aforesaid evidence to it, should have been rejected by the trial court.

**B. Evidence of the Price Charged by Edison Trucking Company or Any Other Contract Carrier for the Haul of Potatoes From the Bakersfield area to Los Angeles in March, 1942, Was Inadmissible for the Reason That It Was Immaterial, Irrelevant and Hearsay. [Rep. Tr. p. 18 and 19, 25 and 26.]**

The Court will note that the only evidence in the record as to any hauls of potatoes being made in March, 1942, from the Bakersfield area to Los Angeles, California, was the testimony of Jack Schnitzer, who testified that "it just happened to be I hauled about twenty sacks the last day of March" for which he had charged eighteen cents per hundred pounds for the haul. All of this evidence was objected to by counsel for appellants upon the ground that it was immaterial as to what discussion took place concerning the ceiling price for trucking and this evidence was admitted under the guise of a discussion at a meeting of the assembled truckers. Certainly, there can be no doubt that this evidence was hearsay and, therefore, inadmissible upon that ground alone.

In addition, it shows how the purported eighteen cent ceiling price was set by the OPA. By their own testimony, merely because one trucker, Jack Schnitzer, had on the last day of March, 1942, hauled twenty sacks of potatoes at a price of eighteen cents per hundred pounds, in the eyes of the OPA that price automatically became the ceiling price for the entire group of truckers in the Bakersfield area.

Appellants have already elaborated upon their contention that GMPR had no applicability to the situation here in question and, by reason thereof, all of the aforesaid evidence is immaterial and irrelevant to the issues.

**C. All the Evidence Introduced by Plaintiff Showing the Methods by Which the "County Shipper" Determines His Maximum Ceiling Prices Under the Provisions of MPR 271, as Amended, Was Inadmissible for the Reason That It Was Immaterial, Irrelevant, and No Proper Foundation Was Laid Therefor. [Rep. Tr. p. 17.]**

Appellants repeat their contention that the only evidence relevant to the issues is that which related to how the intermediate seller computes his maximum prices. Any evidence relating to how the country shipper computes his maximum prices is entirely foreign to the issues presented in this case.

**D. All Evidence of Sales of Potatoes During April and May, 1943, Made by Victory Produce Company, Which Was Not a Party to the Action, Was Incompetent, Irrelevant, and Immaterial for the Reason That the Only Parties Before the Court Were the Individuals Jim Jung and Marty Sherman. [Rep. Tr. p. 18, 19, 21, 52, 67, 75, 82-94.]**

Appellants adopt the contentions heretofore made under Point I of this brief and incorporate them herein by reference.

## Conclusion.

Appellants submit that a grave injustice has been committed by the imposition of judgment against them in the above matter.

1. First, Appellants submit that they complied with the letter and spirit of the regulation issued by the Office of Price Administration. Potatoes were sold to the Victory Produce Company and duly invoiced including the transportation charge. The Victory Produce Company paid the price charged by the country shipper and then took its

appropriate mark-up and sold in turn to its purchaser. The only fly in the ointment was the failure of the Produce Company to inquire into whether or not the country shipper had correctly computed and charged the transportation rate for hauling the potatoes. It is this discrepancy which provides the flimsy basis for the case brought by the Office of Price Administration.

The country shipper in a jury trial in Bakersfield has been held to have been justified in making the transportation charge to Victory Produce Company which Victory Produce Company paid. Now the Victory Produce Company is placed in the position of being mulcted in damages for paying that which the country shipper has been held justified in charging.

There is no question that it is the function of the Office of Price Administration to check and prevent inflation arising out of illegal and unjustifiable price increases. But in this case, the basis of its suit against Appellants is unfounded, its construction of its own regulations artificial, and the prosecution of its action unjustified.

2. Aside from the merits of the controversy, the judgment against Appellants cannot stand since the only entity against which a judgment might have been sought was the Victory Produce Company, which was not a party to the action.

Appellants therefore respectfully submit that judgment heretofore entered in favor of plaintiff and against Appellants be reversed.

Respectfully submitted,

EDWARD M. RASKIN,

*Attorney for Appellants.*